

12-19-2017

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Recommended Citation

Wootton, Whitney C. (2017) "Diversion Not Deportation: Mitigating the Harsh Immigration Consequences of Minor Crimes," *Seattle Journal for Social Justice*: Vol. 16 : Iss. 1 , Article 15.

Available at: <https://digitalcommons.law.seattleu.edu/sjsj/vol16/iss1/15>

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Diversion Not Deportation: Mitigating the Harsh Immigration Consequences of Minor Crimes

Whitney C. Wootton

Our beautiful America was built by a nation of strangers. From a hundred different places or more they have poured forth . . . The land flourished because it was fed from so many sources – because it was nourished by so many cultures and traditions and peoples.¹

Maria Sanchez is a 63-year-old widow, grandmother of three and a legal permanent resident who has lived and worked in Sonoma County, [California], for more than 40 years . . . [After] returning from a vacation in Mexico, which she had [done] several times before without a problem . . . Sanchez was detained at the Oakland airport and questioned for several hours by immigration officials. “They treated me like I was a criminal, and all I’ve ever done is work,” Sanchez [said]. Authorities had found a 14-year-old drug conviction on her record. According to court documents, in 1998, Sanchez had pleaded guilty to one charge of cultivation of marijuana. She [said] she had grown four small plants and soaked the cannabis in rubbing alcohol as a tincture for her arthritis. Sanchez was sentenced to four months of house arrest, three years of probation and a fine.

She thought the case was over. But she was slated for deportation because her conviction qualified as an aggravated felony. . . . “I never would have planted the

¹ Lyndon B. Johnson, *Remarks at the Signing of the Immigration Bill, Liberty Island, New York, October 3, 1965*, THE LYNDON BAINES JOHNSON PRESIDENTIAL LIBRARY (Oct. 3, 1965), <http://www.lbjlibrary.net/collections/selected-speeches/1965/10-03-1965.html>.

marijuana if I would have known that was going to happen,” she [said].²

Maria Sanchez’s story illustrates that even the lowest level criminal acts can result in harsh immigration consequences. While citizens are often allowed to make mistakes, and serve little jail time as first-time offenders,³ noncitizens who make the same mistakes can receive harsher sentences and be effectively banished from their homes and families through deportation. Communities that recognize this disproportionate consequence for noncitizens, and value the immense benefits that noncitizens provide to society, can prevent the immigration hammer from falling on first-time noncitizen offenders. This can be achieved through community collaboration with criminal courts to utilize diversion programs to mitigate the serious immigration consequences of minor crimes for first-time offenders.

One example of the immigration consequences of crime is that an admission of guilt in criminal court can, and often does, lead to detention and deportation for noncitizens. Expungements, suspended sentences, or even a plea with no time served, as the story above so aptly illustrates, will still enable the government to deport a noncitizen. Therefore, communities

² Richard Gonzales, *Immigrant Felons and Deportation: One Grandmother’s Case*, NPR (April 9, 2016, 9:25 AM), <http://www.npr.org/2016/04/09/473503408/immigrant-felons-and-deportation-one-grandmothers-case-for-pardon>.

³ For example, a 2014 study found a discrepancy in the severity of prison sentences between citizens and noncitizens that “cannot [be] fully explained . . . [by] factors normally associated with sentencing severity, such as the seriousness of the offense or criminal history. . . . Noncitizens among all races or ethnic groups are at risk of harsher sentencing. Indeed, [the study finds] that the sentencing disadvantage is greater for white noncitizens than for black citizens.” Amy Patterson Neubert, *Noncitizens Face Harsher U.S. Prison Sentences Compared to Citizens*, PURDUE UNIV. NEWS (Oct. 1, 2014), <https://www.purdue.edu/newsroom/releases/2014/Q4/noncitizens-face-harsher-u.s.-prison-sentences-compared-to-citizens.html> (citing Michael T. Light, et al., *Citizenship and Punishment: The Salience of National Membership in U.S. Criminal Courts*, 79 AM. SOC. REV. 827, 827–49 (Sept. 30, 2014), <http://journals.sagepub.com/doi/abs/10.1177/0003122414543659>).

that value their noncitizen members and want to prioritize keeping families together should lead the way in advocating for a real solution for noncitizens: pre-file or pretrial diversion. Many of the crimes that trigger the attention of immigration enforcement agencies are nonviolent, such as minor drug offenses; those who engage in these behaviors are likely candidates for diversion programs. Such programs already exist in many jurisdictions and can be modified or expanded to protect communities against the negative consequences that deportation can cause.

To be effective, diversion should occur at the pre-file/police-interaction or pretrial/prosecutorial stages of the criminal process. Early diversion is needed because, for individuals with pre-existing grounds for removal, an arrest itself can trigger immigration consequences, particularly in a jurisdiction that collaborates with Immigration and Customs Enforcement (ICE). Furthermore, admissions of guilt for many crimes are in and of themselves grounds for removal. Such admissions, although viewed as routine in the criminal justice system, can result in deportation for a noncitizen. Therefore, a criminal justice community that is truly dedicated to innovative and effective solutions to crime should adopt or expand pre-file or pretrial diversion as a localized method of addressing the negative impact of immigration law on its members.

This article introduces the immigration system as it currently functions, and provides an outline of criminal offenses and convictions that lead to deportation. Next, it assesses the lack of judicial discretion in immigration law, showing why community-based solutions are necessary. Then, it provides a background on community reactions to the harshness of immigration laws, specifically in Washington State. Subsequently, it proposes alternatives for Washington to respond through pre-file and pretrial diversion programs, which would continue the state's history of immigrant-friendly policies. Finally, it addresses funding issues and likely counter-arguments to these proposals.

I. INTRODUCTION TO THE IMMIGRATION SYSTEM

The criminal justice system of the United States has been expanding at an incredible rate, particularly in the past 40 years.⁴ It has seen a rise in incarceration rates to the tune of 500 percent, costing \$51.9 billion in 2013 alone, and currently boasts the highest percentage of incarcerated individuals in the world.⁵ These expansions are, in part, due to the popularity of enacting laws and policies under the banner of “tough on crime” beginning in the 1980s.⁶

Additionally, during those 40 years, the government began to expand its mechanisms to find and deport noncitizens who violated immigration or criminal law. Particularly in the last two decades, the U.S. government has “been pursuing an enforcement-first approach to immigration control that favors mandatory detention and deportation over the traditional [judicial] discretion to consider the unique circumstances of every case.”⁷ In the wake of the September 11th attacks, Congress passed the Homeland Security Act, which implemented the “single-largest government reorganization since the [1949] creation of the Department of Defense.”⁸ The Act, among other things, created the Department of Homeland Security (DHS) to oversee several new agencies: the Bureau of Immigration and Customs Enforcement (ICE), United States Citizenship and Immigration Services (USCIS), and

⁴ See *Fact Sheet: Trends in U.S. Corrections*, THE SENTENCING PROJECT, <http://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf> (last visited Dec. 2015).

⁵ *Id.* at 1–2.

⁶ Cyrus Tata et al., *Getting Tough on Crime: The History and Political Context of Sentencing Reform Developments Leading to the Passage of the 1994 Crime Act*, SENT’G & SOC’Y: INT’L PERSP., 11 (2002), <https://pdfs.semanticscholar.org/514e/0bb2ab8f695e9e6fc28a82b545e8743f6876.pdf>

⁷ *The Growth of the U.S. Deportation Machine: More Immigrants are being “Removed” from the United States than Ever Before*, AMERICAN IMMIGRATION COUNCIL 1 (Mar. 2014), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_growth_of_the_us_deportation_machine.pdf.

⁸ HISTORY OF ICE, <https://www.ice.gov/history> (last visited October 28, 2016).

Customs and Border Protections (CBP).⁹ Since 2003, spending on immigration enforcement has only increased: ICE’s budget has grown 73 percent, and CBP’s spending has doubled.¹⁰ During the 2014 fiscal year, “DHS and the White House requested \$1.84 billion for DHS Custody Operations” alone, and planned to spend about \$5.6 million *per day* to detain immigrants.¹¹ In addition, these agencies “formally removed 3.7 million noncitizens” in their first decade of operations.¹²

The Obama administration, despite enacting DACA and similar immigrant-friendly policies, was still extremely tough on immigration.¹³ In fact, “more immigrants were forcibly removed from the United States under Obama than any other president” as of 2016.¹⁴ One reason for this increase in deportations was Obama’s expansion of the Secure Communities program, enacted in 2008 under former President George W. Bush.¹⁵ Secure Communities was a data-sharing agreement between local law enforcement and immigration officials, so that “any time an individual [was] arrested and booked into a local jail for any reason, his or her fingerprints [were]

⁹ See Homeland Security Act of 2002, 6 U.S.C. §§ 111, 211, 252, 271 (2002); see also Ted Hesson, *Five Ways Immigration System Changed After 9/11*, ABC NEWS (Sept. 11, 2012), http://abcnews.go.com/ABC_Univision/News/ways-immigration-system-changed-911/story?id=17231590.

¹⁰ AMERICAN IMMIGRATION COUNCIL, *supra* note 7, at 4.

¹¹ *The Math of Immigration Detention*, NATIONAL IMMIGRATION FORUM (Aug. 22, 2013), <http://immigrationforum.org/blog/themathofimmigrationdetention> (emphasis added).

¹² *The U.S. Deportation System: Trends from a Decade of Data*, MIGRATION POLICY INSTITUTE (Oct. 16, 2016), <http://www.migrationpolicy.org/events/us-deportation-system-trends-decade-data>.

¹³ See Amanda Sakuma, *Obama Leaves Behind a Mixed Legacy on Immigration*, NBC (Jan. 15, 2017), <http://www.nbcnews.com/storyline/president-obama-the-legacy/obama-leaves-behind-mixed-legacy-immigration-n703656>.

¹⁴ *Id.*

¹⁵ Editorial Board, *The ‘Secure Communities’ Illusion*, N.Y. TIMES (Sept. 5, 2014), https://www.nytimes.com/2014/09/06/opinion/the-secure-communities-illusion.html?_r=0.

electronically run through ICE’s immigration database.”¹⁶ This enabled ICE to “target people at the time of arrest and not conviction, [so it captured even] people who [would] never be charged with a state crime.”¹⁷ Inevitably, this created a significant rift between communities and local law enforcement, causing fear and “detering victims and witnesses from reporting crimes and undermining community policing partnerships that keep everyone safe from crime.”¹⁸

In a step toward immigration reform, the Obama administration terminated Secure Communities and instead enacted the Priority Enforcement Program in 2014, which purported to prioritize the deportation of the most dangerous criminals.¹⁹ As President Obama stated, the priority was “felons, not families. Criminals, not children. Gang members, not a mom who’s working hard to provide for her kids.”²⁰ However, while the government claimed to prioritize violent offenders for deportation, in reality, less than 29 percent of noncitizens deported between 2003 and 2013 had committed violent crimes.²¹

¹⁶ *Secure Communities (“S-Comm”)*, AMERICAN CIVIL LIBERTIES UNION, <https://www.aclu.org/other/secure-communities-s-comm> (last visited Nov. 9, 2017).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration and Customs Enf’t, et al. (Nov. 20, 2014),

https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf; *see also* Memorandum from John Morton, Dir., to All ICE Emp. (Mar. 2, 2011), <https://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf>.

²⁰ Remarks by the President to the Nation on Immigration, THE WHITE HOUSE OFFICE OF THE PRESS SECRETARY (Nov. 20, 2014), <https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>.

²¹ *See* Marc R. Rosenblum et al., *Deportation and Discretion, Reviewing the Record and Options for Change*, 15 MIGRATION POL’Y INST. 1, 44–47 (Oct. 2014), <http://www.migrationpolicy.org/research/deportation-and-discretion-reviewing-record-and-options-change> (showing that 41 percent of all removals from 2003 to 2013 were criminal removals. Of those, only 8 percent were FBI Part 1 crimes, and 6 percent were FBI Part 2 violent crimes, bringing the total of violent crime removals to 14 percent).

On January 25, 2017, Donald Trump issued an executive order cancelling the Priority Enforcement Program and reviving Secure Communities.²² In addition, the order directed the Secretary of State to “empower State and local law enforcement agencies across the country to perform the functions of an immigration officer in the interior of the United States to the maximum extent permitted by law.”²³ This change brings all of the concerns about the 2008 Secure Communities program back to the forefront of national debate: communities that wish to build strong, trusting relationships between individuals and local police are once again facing pushback from the federal government.²⁴ Advocates point out that “[i]f a police agency cannot assure its immigrant community that there will be no immigration consequences to providing information or cooperating with police, immigrants will be less likely to come forward to report crimes.”²⁵ To counter this insecurity, communities should think creatively about how to protect and maintain good relationships with their noncitizen members.

A. Criminal Offenses and Convictions Leading to Deportation

The Immigration and Nationality Act (INA) governs when and under what conditions an individual can be deported from the U.S.²⁶ The INA covers crimes that fall into three broad categories: Crimes Involving Moral Turpitude (CIMTs),²⁷ Aggravated Felonies,²⁸ and crimes relating to controlled substances, firearms, and domestic violence, among other

²² See Exec. Order No. 13,768, 82 Fed. Reg 8799 at 8801 (Jan. 25, 2017).

²³ *Id.*

²⁴ See Michele Waslin, *The Secure Communities Program: Unanswered Questions and Continuing Concerns*, AMERICAN IMMIGRATION COUNCIL—IMMIGRATION POLICY CENTER 12-13 (Nov. 2011), https://www.americanimmigrationcouncil.org/sites/default/files/research/Secure_Communities_112911_updated.pdf.

²⁵ *Id.*

²⁶ See The Immigration and Nationality Act, 8 U.S.C. §§1101-1178.

²⁷ 8 U.S.C. § 1227(a)(2)(A)(i).

²⁸ See 8 U.S.C. § 1227(a)(2)(A)(iii); see also 8 U.S.C. § 1101(a)(43) (defining “aggravated felony”).

offenses.²⁹ In total, INA §237(a)(2) includes about fifteen ways in which an individual can be deported based on a criminal conviction. Additionally, the subsection on aggravated felonies contains twenty-one subsections, several of which have their own subparts.³⁰

The immigration laws that address controlled substance crimes are particularly broad. Under the INA, “a noncitizen who at any time after admission [into the U.S.] has been convicted of any state, federal, or foreign country law *related* to controlled substances, other than possession for personal use of 30 grams or less of marijuana, is deportable.”³¹ An example of a conviction related to a controlled substance is “use of paraphernalia,” which triggers the same immigration consequences as a possession charge.³²

With very few exceptions,³³ a “conviction” is required for one of the above criminal offenses before a noncitizen becomes deportable.³⁴ Under the INA, a “conviction” of a noncitizen is:

(A) . . . a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where – (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has *admitted sufficient facts* to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

(B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law *regardless*

²⁹ 8 U.S.C. § 1227(a)(2)(B)–(F).

³⁰ 8 U.S.C. § 1101(a)(43)(A)–(U)

³¹ Kevin R. Johnson et al., UNDERSTANDING IMMIGRATION LAW 405 (Lexis Nexis, 1st ed. 2009). (*citing* 8 U.S.C. § 1227(a)(2)(B)(i)) (emphasis added).

³² *See* WASH. REV. CODE § 69.50.412(1); *see also*, *Luu-Le v. INS*, 224 F.3d 911 (9th Cir. 2000) (finding that possession of drug paraphernalia qualifies as a crime relating to a controlled substance).

³³ 8 U.S.C. § 1227(a)(2)(B)(ii) (stating that “any alien who is, or at any time after admission has been, a drug user or addict is deportable”); 8 U.S.C. § 1227(a)(2)(E)(ii) (related to noncitizens who violate protection orders).

³⁴ *See* 8 U.S.C. § 1227(b).

of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.³⁵

This broad definition of “conviction” significantly raises the stakes for noncitizens who find themselves facing the criminal justice system.

Furthermore, no matter how old a conviction is, it can still come back to haunt a noncitizen. The INA specifically states that any noncitizen “who *at any time* after admission has been convicted of a violation of (or conspiracy or attempt to violate) any law . . . relating to a controlled substance, other than a single offense involving possession for one’s own use of 30 grams or less of marijuana, is deportable.”³⁶ Maria Sanchez’s story, described above, is the perfect example of this law in action.³⁷ Noncitizens who make a single mistake and receive a criminal conviction can, decades later, be torn from the lives, families, and careers they have built in the U.S. at the government’s will.

B. Detention Prior to Deportation

In addition to incarcerating more individuals than any country in the world, the U.S. also runs “the world’s largest immigration detention system, [detaining] on any given day . . . some 30,000 people . . . at an estimated cost of nearly \$150 a day” per detainee.³⁸ In 2015, a study of detention duration “reported that despite [a] Supreme Court ruling [that indefinite detention of noncitizens is unconstitutional], thousands of non-citizens on any given night have been detained for periods of more than six months, including after receiving a removal order.”³⁹ Detention is not only costly to

³⁵ 8 U.S.C. § 1101(a)(48) (emphasis added).

³⁶ 8 U.S.C. § 1227(a)(2)(B)(i) (emphasis added).

³⁷ Gonzalez, *supra* note 2.

³⁸ *United States Immigration Detention*, GLOBAL DETENTION PROJECT, <https://www.globaldetentionproject.org/countries/americas/united-states> (last visited Nov. 19, 2016).

³⁹ *Id.* (citing Center for Migration Studies, et al., *Unlocking Human Dignity: A Plan to Transform the U.S. Immigration Detention System*, 3 J. MIGRATION & HUM. SECURITY 2, 160, 178 & 183 (2015)).

taxpayers, but leads to “fractured families, human rights violations, abandoned legal claims, and diminished national prestige.”⁴⁰ As of 2014, the detention system included “roughly 250 facilities [comprised of] a sprawling hodgepodge of state and local jails, for-profit prisons, [Bureau of Prisons or] BOP prisons, Border Patrol holding cells, and prison-like ‘service processing centers’ administered by ICE.”⁴¹ Despite the heavy reliance on prisons, detention is not technically punishment and therefore detainees do not possess the same robust set of rights as criminal defendants.⁴² Chillingly, “immigration officials are not required to obtain probable cause that a migrant has violated immigration law before taking [her] into a secure facility.”⁴³

When the government wants to deport a noncitizen who is already inside the U.S., it may choose to detain her or release her on her own recognizance or on bond.⁴⁴ Specifically, the INA states that generally, “an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States.”⁴⁵ The statute requires mandatory detention for those who are deportable because they committed multiple crimes or a single “crime involving moral turpitude”⁴⁶ for which the sentence was greater than one year.⁴⁷

⁴⁰ Center for Migration Studies, et al., *Unlocking Human Dignity: A Plan to Transform the U.S. Immigration Detention System*, 3 J. MIGRATION & HUM. SECURITY 160, 163 (2015).

⁴¹ *Id.* at 169.

⁴² *Wong Wing v. United States*, 163 U.S. 228, 235 (1869); *see also, Is DHS Admitting Immigration Detention is Punishment*, CRIMMIGRATION, <http://crimmigration.com/2014/09/25/is-dhs-admitting-immigration-detention-is-punishment/> (last visited Nov. 19, 2016).

⁴³ Crimmigration, *supra* note 42.

⁴⁴ For the purposes of this paper, I will not address noncitizens who are “arriving aliens” under INA § 212.

⁴⁵ 8 U.S.C. § 1226(a).

⁴⁶ *See Matter of Short*, 20 I. & N. Dec. 136, 139 (BIA 1989) (stating that a crime involving moral turpitude (CMT) “refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man”); *see also* Ann Benson, et al., *Crimes Involving Moral Turpitude*, WASH. DEFENDER ASS’N IMMIGRATION PROJECT, 11-14

Once detained by ICE, noncitizens “can be held for anywhere from a few weeks to a few years while their cases proceed.”⁴⁸ One study of 1,000 detainees found that the “length of time varied: 86 detainees were held for more than two years; one was held for 1,585 days, or more than four years.”⁴⁹ Those in custody for “at least six months [had] spent an average of 404 days—more than 13 months” in detention.⁵⁰

C. The Fall of Judicial Discretion

When Congress passed legislation in the 1990s increasing the number of criminal offenses leading to deportation and expanding the scope of a “conviction,” Congress also eliminated two significant forms of judicial discretion.⁵¹ The first to be eliminated was the Judicial Recommendation Against Deportation (JRAD), which “gave criminal sentencing judges the ability to weigh discretionary factors in determining whether a criminal conviction warranted punishment beyond criminal punishment by way of deportation.”⁵² If a judge chose to use this discretionary power, the order was binding for the purposes of immigration proceedings and prevented the

http://www.defensenet.org/immigration-project/immigration-resources/cimt_last_jm_may_2010.doc PROJECT (last viewed Nov. 9, 2017) (stating that crimes involving malice or the intent to defraud, steal, or cause or threaten great bodily harm are generally CIMTs).

⁴⁷ 8 U.S.C. § 1226(c).

⁴⁸ *A Costly Move: Far and Frequent Transfers Impede Hearings for Immigrant Detainees in the United States*, HUMAN RIGHTS WATCH (June 14, 2011), <https://www.hrw.org/report/2011/06/14/costly-move/far-and-frequent-transfers-impede-hearings-immigrant-detainees-united>.

⁴⁹ *Editorial: For Detained Immigrants, a Too-Long Wait for Justice*, L.A. TIMES (April 22, 2014, 5:54 PM), <http://www.latimes.com/opinion/editorials/la-ed-immigration-detention-20140423-story.html>.

⁵⁰ *Id.*

⁵¹ Philip L. Torrey, *Immigration Briefings*, HARVARD IMMIGRATION CLINIC 7 (Feb. 2014) <https://harvardimmigrationclinic.files.wordpress.com/2013/02/here1.pdf> (stating that the Immigration Act of 1990 repealed Judicial Recommendations Against Deportation, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 repealed the § 212(c) Waiver of Deportation).

⁵² *Id.* at 3.

noncitizen from being deported.⁵³ Congress granted this discretionary power in 1917 “to prevent the harsh dual punishment of deportation following a criminal sentence.”⁵⁴ The JRAD was repealed in 1990.⁵⁵

The second form of discretion Congress eliminated in the 1990s was the §212(c) Waiver of Deportation.⁵⁶ Congress provided immigration officials with the power to use this discretionary waiver in cases where noncitizens with criminal convictions “demonstrate[d] that positive discretionary factors outweighed the negative discretionary factors.”⁵⁷ Specifically, immigration officials weighed the “length of residence in the United States, family ties in the United States, hardship to the applicant and the applicant’s family members, and evidence of good moral character” against “the extensiveness and seriousness of the applicant’s criminal record, other violations of the immigration laws, and evidence of poor moral character.”⁵⁸ However, “as political tides shifted toward increasing deportations, Congress restricted and ultimately repealed” the §212(c) Waiver of Deportation in 1996 “because [Congress] erroneously believed that [waivers] were granted too frequently or allowed too many noncitizens with criminal convictions to avoid deportation.”⁵⁹ Senator Ted Kennedy, arguing against the repeal of the §212(c) Waiver of Deportation, stated that the repeal

applies to all criminal aliens, regardless of the gravity of their offenses . . . [W]hether they are murderers or petty shoplifters. An immigrant with an American citizen wife and children sentenced to a 1-year probation for minor tax evasion and fraud would be subject to [deportation]. And under [the 1996 law], he would be treated the same as ax murderers and drug lords.⁶⁰

⁵³ *Id.*

⁵⁴ *Id.* at 4.

⁵⁵ *Id.* at 5.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 2.

⁶⁰ *Id.* at 8.

This lack of judicial discretion is a significant barrier to ensuring fair and just outcomes for noncitizens. Without the “authority to administer justice that reflects the specific circumstances of an individual case . . . an adjudicator [does not have] the opportunity to ensure that [immigration] consequences are appropriate considering the severity of the criminal offense.”⁶¹ As a result, the system creates a plethora of situations like that of Maria Sanchez’s—situations in which fairness seems to play no role at all.

II. COMMUNITY REACTIONS TO HARSH IMMIGRATION LAWS

A surprising result of the federal government’s increasingly harsh immigration laws is that communities have begun to think creatively about how to mitigate the impact of these immigration laws.⁶² As far back as the 1980s, communities were speaking out against the government’s treatment of noncitizens through the Central American Sanctuary Movement.⁶³ This movement “encourage[d] non-violent and church-based responses” on behalf of asylum applicants from Central America who were being “routinely rejected” by the U.S. government.⁶⁴ Over the years, approximately 300 state and local governments have become self-selected sanctuaries.⁶⁵ Some jurisdictions have adopted “non-cooperation” or “don’t ask, don’t tell” policies, which prohibit law enforcement officers from asking about an individual’s immigration status and/or sharing that information with the federal government; others have chosen to issue identification to individuals regardless of their status.⁶⁶ Sanctuary cities are highly controversial and cannot completely shield noncitizens from the federal government.⁶⁷ However, their existence shows not only that certain

⁶¹ *Id.* at 2.

⁶² See Rose Cuison Villazor, *What Is a “Sanctuary”?*, 61 SMU L. REV. 133, 141 (2008).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Bryan Griffith et al., *Map: Sanctuary Cities, Counties, and States*, CENTER FOR IMMIGRATION STUDIES, <http://cis.org/Sanctuary-Cities-Map> (last visited Nov. 16, 2016).

⁶⁶ See Villazor, *supra* note 62, at 148.

⁶⁷ See Villazor, *supra* note 62, at 148.

cities and states recognize the need to protect community members regardless of immigration status, but that they are willing to take action to do so.

Another manifestation of the desire to protect noncitizen community members is the existence of jurisdictions “that [seek] to shield the criminal process from consideration of immigration status and the disproportionate effects of immigration enforcement on criminal bargaining and sentencing outcomes.”⁶⁸ For example, Los Angeles County, California police, prosecutors, defense attorneys, and judges cooperate at every stage of interaction with criminal defendants to focus on “justice . . . not someone’s immigration status.”⁶⁹ In practice, this means that police are prohibited from actively seeking to discover an individual’s immigration status,⁷⁰ prosecutors do not base arguments (for example, flight risk arguments at a bail hearing) on an individual’s status,⁷¹ and judges have not “ordered the probation department to cooperate with ICE.”⁷² Defense attorneys raise the issue of immigration status only in its relation to the collateral consequences of plea bargaining. Their goal is to “alert prosecutors to the possibility that there could be more sanctions above and beyond the sanctions that would be applied to anyone else.”⁷³ As a result, prosecutors are encouraged to consider the full extent of the consequences a noncitizen will face in a given

⁶⁸ Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Law Enforcement*, 88 N.Y.U. L. REV. 1126, 1134 (2013).

⁶⁹ *Id.* at 1162 (quoting Telephone Interview with Richard Doyle, Dir., Bureau of Specialized Prosecutions, L.A. Cnty. Dist. Attorney’s Office, L.A., Cal. (Aug. 20, 2010) (internal quotes omitted)).

⁷⁰ *Id.* at 1158.

⁷¹ *Id.* at 1161.

⁷² *Id.* at 1166.

⁷³ *Id.* at 1158 (quoting Telephone Interview with Janice L. Maurizi, Dir., Bureau of Fraud & Corruption Prosecution, L.A. Cnty. Dist. Attorney’s Office, L.A., Cal. (Oct. 22, 2010)).

plea.⁷⁴ This type of cooperation is a demonstration of the community’s “‘humanity’ and ‘compassion’ toward undocumented immigrants.”⁷⁵

III. NONCITIZENS IN WASHINGTON

The state of Washington relies significantly on noncitizens for taxes, labor, and economic activity. The state is home to nearly one million immigrants, and 13.5 percent of the state’s population is comprised of foreign-born individuals.⁷⁶ While many argue that undocumented noncitizens are a drain on society and should be deported from the state, in reality these same noncitizens are positive contributors, paying approximately \$301.9 million in state and local taxes each year.⁷⁷ In addition, noncitizen workers “represent 14.3 percent of Washington’s civilian workforce, and constitute a significant portion of the growth in Washington’s labor force.”⁷⁸ If every undocumented noncitizen were deported tomorrow, “Washington would lose \$14.5 billion in economic activity, \$6.4 million in gross state product, and approximately 71,197 jobs.”⁷⁹

⁷⁴ *See id.*

⁷⁵ *Id.* at 1159–1160 (quoting Joel Rubin, *LAPD: New Impound Law Shows ‘Compassion’ for Illegal Immigrants*, L.A. TIMES BLOGS (Feb. 28, 2012), <http://latimesblogs.latimes.com/lanow/2012/02/lapd-new-impound-law-shows-compassion-for-illegal-immigrants.html>).

⁷⁶ *New Americans in Washington*, AMERICAN IMMIGRATION COUNCIL, https://www.americanimmigrationcouncil.org/sites/default/files/infographics/washington_infographic_2015.png (last visited Nov. 5, 2016).

⁷⁷ *Id.*

⁷⁸ Pramila Jayapal et al., *Building Washington’s Future: Immigrant Workers’ Contributions to Our State’s Economy*, ONEAMERICA 10, https://weareoneamerica.org/sites/default/files/Immigrant_Contributions_to_Our_State_Economy.pdf (last visited Nov. 19, 2016).

⁷⁹ American Immigration Council, *supra* note 76. While immigration opponents might argue that these jobs could and should go to citizen workers, a 2013 study explored the most common occupations among workers without high school diplomas, and found that “immigrants and native workers with low levels of education may be competing for different jobs and even could be complementing each other. Immigration status can constrain a worker’s job choices, but many immigrants are working different jobs from natives because they have limited English language or technical skills, or because they

Washington has always respected and relied on immigrants for its success.⁸⁰ In 1889, Washington became the 42nd state to join the union,⁸¹ and beginning in the 1900s, “civic organizations to attract immigrants sprang up across the state.”⁸² In 1975, after the Vietnam War, California’s governor Jerry Brown made negative statements about Vietnamese refugees who were settling in California.⁸³ Washington’s governor, Daniel Evans, was bothered by this reaction to refugees, so he sent an aide to California to inform refugees that they were welcome in Washington.⁸⁴ This act of “actively [inviting refugees and immigrants] to come to the Evergreen State [has] influenced long-term immigration trends,” particularly in King County.⁸⁵

For example, in 1993, Washington was one of the first states to issue driver’s licenses to individuals without requiring a social security number or proof of citizenship, which made it possible for noncitizens to drive legally regardless of their immigration status.⁸⁶ In addition, in late 2015, at the height of American fears triggered by the Paris attacks and the Syrian refugee crisis, Governor Jay Inslee publicly announced that he refused “to join the growing list of governors who say they don’t want Syrian refugees

have insufficient exposure to the US workplace.” Maria E. Enchautegui, *Immigrant and Native Workers Compete for Different Low-Skilled Jobs*, URBAN INSTITUTE, <http://www.urban.org/urban-wire/immigrant-and-native-workers-compete-different-low-skilled-jobs> (last visited June 26, 2017).

⁸⁰ See Jayapal, *supra* note 78, at 15.

⁸¹ Greg Lange, *Washington is Admitted as the 42nd State to the United States of America on November 11, 1889*, HISTORYLINK.ORG (Feb. 15, 2003) <http://www.historylink.org/File/5210>.

⁸² Jayapal, *supra* note 78, at 15.

⁸³ Feliks Banel, *Refugee, Immigration Controversy has Long History in Washington*, MYNORTHWEST (Nov. 18, 2015, 9:56 AM), <http://mynorthwest.com/147827/refugee-immigration-controversy-has-long-history-in-washington>.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ WASH. REV. CODE § 46.20.035(3).

within their state borders.”⁸⁷ Almost one year later, on the same day Donald Trump was elected as the 45th president of the United States, former Seattle Mayor Ed Murray announced that Seattle’s status as a sanctuary city for noncitizens would not change, “even if that means losing federal funding.”⁸⁸ This attitude of protectiveness toward noncitizens has been a feature of Washington public sentiment and policy for decades, and a logical extension of this welcoming atmosphere is to offer noncitizen first-time offenders who commit minor, nonviolent crimes a second chance.

In addition to actively welcoming noncitizens, Washington’s farming industry heavily relies on the noncitizen population for its continued success.⁸⁹ For example, Washington is the largest apple supplier in the nation and “produces more apples than all other states combined, and employs more agricultural workers than every state except California.”⁹⁰ The industry “requires about 45,000 workers to hand pick the crop,” and “orchard owners [actively work] to recruit . . . immigrant workers” as well as American workers.⁹¹ The apple industry and others rely on noncitizens because “nationally, undocumented workers fill niches left hollow by a morphing native workforce” and “complement an increasingly older and better-educated American [citizen] workforce.”⁹² Therefore, no matter how individuals personally feel about noncitizens in Washington, noncitizens

⁸⁷ Ted S. Warren, *Washington State Governor Says He Welcomes Syrian Refugees*, NPR (Nov. 18, 2015, 9:54 AM), <http://www.npr.org/sections/thetwo-way/2015/11/18/456483078/washington-state-governor-says-he-welcomes-syrian-refugees>.

⁸⁸ Daniel Beekman, *Seattle Will Remain Sanctuary City for Immigrants Despite Trump Presidency, Mayor Says*, SEATTLE TIMES (Nov. 9, 2016), http://www.seattletimes.com/seattle-news/politics/seattle-will-remain-sanctuary-city-for-immigrants-despite-trump-presidency-mayor-says/?utm_content=buffer6a776&utm_medium=social&utm_source=facebook.com&utm_campaign=owned_buffer_f_m.

⁸⁹ Jayapal, *supra* note 78, at 15.

⁹⁰ *Id.* at 34.

⁹¹ *Id.*

⁹² *Id.*

remain a vital part of our communities and workforce and deserve protections.

IV. WASHINGTON’S RESPONSE: PRE-FILE AND PRETRIAL DIVERSION AS COMMUNITY-BASED SOLUTIONS TO HARSH IMMIGRATION LAWS

Diversion programs have long been present in Washington criminal courts and are the product of a shift in sentiment regarding criminal justice.⁹³ This shift “eschew[s] tough-on-crime policies in favor of the deliberate and data-driven application of resources to solutions that will generate the greatest return to communities and taxpayers in terms of cost savings, public safety, long-term health and personal stability for justice-involved populations.”⁹⁴ According to the Pretrial Diversion/Intervention Standards developed by the National Association of Pretrial Service Agencies in 2008, the

purpose of a pretrial diversion/intervention program is to enhance justice and public safety through addressing the root cause of the arrest provoking behaviors of the defendant, reducing the stigma which accompanies a record of conviction, restoring victims and assisting with the conservation of court and criminal justice resources.⁹⁵

In a 2013 report on public defense in the state, the Washington Supreme Court identified “diversion” as “a term used to encompass practices ranging

⁹³ See *Policy and Procedure Manual*, KING COUNTY DRUG DIVERSION COURT (2015), <http://www.kingcounty.gov/~media/courts/Clerk/drugCourt/documents/KCDDC-PP-Manual.ashx?la=en> (referencing Drug Court in existence since 1994).

⁹⁴ *No Entry: A National Survey of Criminal Justice Diversion Programs and Initiatives*, CENTER FOR HEALTH AND JUSTICE AT TASC 5 (2013), http://www2.centerforhealthandjustice.org/sites/www2.centerforhealthandjustice.org/files/publications/CHJ%20Diversion%20Report_web.pdf.

⁹⁵ *Performance Standards and Goals for Pretrial Diversion/Intervention*, NATIONAL ASS’N OF PRETRIAL SERVICE AGENCIES 2 (2008), <https://netforumpro.com/public/temp/ClientImages/NAPSA/2bf61b50-6b7d-4292-8837-e6b48a1b2a7a.pdf>.

from formal programs with supervisory oversight, to informal reduction of misdemeanors to infractions.”⁹⁶ The report acknowledges that while “no statutory requirements exist for adult diversion programs,” such programs could significantly reduce the workload for courts and public defenders.⁹⁷

While pretrial diversion programs such as drug courts are not required by law, they are already in existence by choice in many Washington jurisdictions.⁹⁸ In 2015, six Washington Senators introduced a bill⁹⁹ with the goal of “encouraging the establishment of therapeutic courts” by updating and consolidating statutes governing such courts into a new chapter of the Revised Code of Washington.¹⁰⁰ The new chapter authorizes “every trial and juvenile court . . . to establish and operate therapeutic courts” and acknowledges that such courts already in existence are properly authorized.¹⁰¹ It states that “therapeutic court programs may include, but are not limited to . . . adult drug court[s]”¹⁰² and outlines the purpose of these court programs as allowing “defendants or respondents the opportunity to obtain treatment services to address particular issues that may have contributed to the conduct that led to their arrest . . . in exchange for resolution of the case or charges.”¹⁰³

⁹⁶ *Report to the Wash. Supreme Court on the Implementation of Standards for Indigent Defense: Pursuant to Wash. Supreme Court Order No. 25700-A-1013*, WASH. STATE OFFICE OF PUBLIC DEFENSE 10 n.14 (2013), http://opd.wa.gov/documents/0094-2013_Standards-Report.pdf.

⁹⁷ *Id.* at 10 n.12.

⁹⁸ See King County Drug Diversion Court, *supra* note 93; *Adult Diversion*, CLARK CITY PROSECUTING ATTORNEY, <https://www.clark.wa.gov/prosecuting-attorney/adult-diversion> (last visited Feb. 20, 2017); “*Drugs No More*” *Diversion Program*, KLICKITAT COUNTY WASHINGTON, <http://www.klickitatcounty.org/160/Drugs-No-More-Diversion-Program> (last visited Feb. 20, 2017); *Thurston County Prosecuting Attorney’s Office*, THURSTON COUNTY WASHINGTON, <http://www.co.thurston.wa.us/pao/criminal-division.html> (last visited Feb. 20, 2017).

⁹⁹ S.B. 5107, 64th Leg., Reg. Sess. (Wa. 2015).

¹⁰⁰ WASH. REV. CODE §2.30.

¹⁰¹ *Id.* at §2.30.030(1).

¹⁰² *Id.* at §2.30.030(4).

¹⁰³ *Id.* at §2.30.030(1).

The statute further describes individuals who are statutorily ineligible to participate in therapeutic courts:

(a) Individuals who are currently charged or who have been previously convicted of a serious violent offense or sex offense as defined in RCW 9.9A.030; (b) Individuals who are currently charged with an offense alleging intentional discharge, threat to discharge, or attempt to discharge a firearm in furtherance of the offense; (c) Individuals who are currently charged with or who have been previously convicted of vehicular homicide or an equivalent out-of-state offense; or (d) Individuals who are currently charged with or who have been previously convicted of: An offense alleging substantial bodily harm or great bodily harm as defined in RCW 9A.04.110, or death of another person.¹⁰⁴

Aside from the few requirements listed in the statute, “a therapeutic court retains discretion to establish processes and determine eligibility for admission to the therapeutic court process unique to their community and jurisdiction.”¹⁰⁵ Therefore, trial courts, and the communities that the courts interact, with have the ability to determine whether an individual’s immigration status plays a role in her ability to participate in diversion programs like drug courts.¹⁰⁶

Pretrial diversion is generally defined as “any level or stage of justice supervision between law enforcement and engagement with a trial or post-plea problem-solving court.”¹⁰⁷ Such programs are commonly adopted for their “cost- and time-effectiveness benefits.”¹⁰⁸ They also lead to lower recidivism and allow individuals to avoid the long-term negative consequences of a criminal conviction, such as difficulty in finding housing and employment.¹⁰⁹

¹⁰⁴ *Id.* at §2.30.030(3) (outlining other offenses that make individuals ineligible to participate in therapeutic courts).

¹⁰⁵ *Id.* at § 3, Art. 2.

¹⁰⁶ *Id.*

¹⁰⁷ Center for Health and Justice at TASC, *supra* note 94, at 16.

¹⁰⁸ Center for Health and Justice at TASC, *supra* note 94, at 17.

¹⁰⁹ Center for Health and Justice at TASC, *supra* note 94, at 17.

Common pretrial diversion programs include drug courts, which have been serving Washington communities since 1994.¹¹⁰ In fact, 24 counties in Washington State offer diversion through adult drug courts, though requirements for participation vary by jurisdiction.¹¹¹ In order for drug courts and other pretrial diversion programs to be effective at protecting noncitizen community members, however, they should be made available to citizens and noncitizens alike and must not require admissions of guilt or pleas that could trigger immigration consequences.

A. Why Diversion?

As discussed above, a noncitizen can face deportation at many phases of the criminal justice process.¹¹² If a noncitizen has a pre-existing ground for deportation (such as an old conviction), an arrest can cause the individual to become flagged in databases to which ICE has access, and lead to deportation, even if she is completely innocent of the crime for which the arrest was made.¹¹³ If a noncitizen is charged and admits to certain facts or is convicted of an offense, even if she does not spend one day in jail, the admission or conviction can and likely will lead to deportation if the crime is one covered under the INA.¹¹⁴ This is a particularly serious risk for the noncitizen community in light of President Trump's January 25, 2017, executive order expanding the deportation enforcement priorities from violent criminals to any noncitizen who has "been convicted of any criminal offense; [has] been charged with any criminal offense, where such charge has not been resolved; [or has] committed acts that constitute a chargeable

¹¹⁰ See King County Drug Diversion Court, *supra* note 93; see also *Drug Courts & Other Therapeutic Courts*, WASHINGTON COURTS https://www.courts.wa.gov/court_dir/?fa=court_dir.psc&tab=2 (last visited Nov. 19, 2016).

¹¹¹ Washington Courts, *supra* note 110.

¹¹² See discussion *supra* Section I(A).

¹¹³ See discussion *supra* Section I(A).

¹¹⁴ See discussion *supra* Section I(A).

offense.”¹¹⁵ Pre-file and pretrial diversion programs can prevent deportation in both of these situations if the noncitizen is willing, able, and qualified to participate. As a result, the individual will receive the services she needs to get her life back on track instead of having it torn apart by the immigration system.

B. Potential Diversion Models

A 2013 national survey of diversion programs¹¹⁶ identified several primary “phases” of the criminal justice process at which diversion most often occurs, among which are: (1) the law enforcement phase, and (2) the pretrial or prosecution phase.¹¹⁷ Each of these phases offers a way for noncitizens who engage in criminal acts and otherwise qualify for diversion programs to avoid deportation.

1. Diversion at the Pre-File or Law Enforcement Phase

Programs that divert individuals at the law enforcement phase reflect “robust collaborative efforts between local law enforcement, mental health and substance use providers and advocates, individuals with mental health and/or substance use issues, and their families.”¹¹⁸ The purpose of diversion so early in the legal process is to “safely manage incidents involving individuals with symptoms of behavioral health conditions, to avoid arrest and formal involvement in the criminal justice system when appropriate and to ensure service provision that addresses behavioral health needs.”¹¹⁹

One example of diversion at the law enforcement phase is King County’s Law Enforcement Assisted Diversion (LEAD) program. Since 2011, King

¹¹⁵ Exec. Order No. 13768, 82 Fed. Reg. 8799 at 8800 (Jan. 25, 2017).

¹¹⁶ Center for Health and Justice at TASC, *supra* note 94, at 8 (defining diversion as “programs that afford an opportunity to address an individual’s behavior without resulting in a conviction on an individual’s record”).

¹¹⁷ Center for Health and Justice at TASC, *supra* note 94, at 11.

¹¹⁸ Center for Health and Justice at TASC, *supra* note 94, at 12.

¹¹⁹ Center for Health and Justice at TASC, *supra* note 94, at 12.

County has used LEAD to divert eligible individuals before they are booked by “allow[ing] officers to redirect low-level offenders engaged in drugs or prostitution activity to community-based services instead of jail and prosecution.”¹²⁰ In practice, this means that when officers who participate in LEAD encounter an individual who could otherwise be arrested, booked, and referred for prosecution, the officer instead has the ability to refer that individual to the LEAD program¹²¹ either directly or after making an arrest.¹²² After the officer makes the referral, “the LEAD team provide[s] an immediate individual assessment to determine what factors led the individual to engage in street-level drug activity or prostitution.”¹²³ Over time, participants work with case managers who provide services with the goal of “reduc[ing] the harm the individual is causing to herself and the community.”¹²⁴ Services include “mental health, substance abuse, employment/labor, housing,” and other public benefits.¹²⁵

The LEAD program has several eligibility requirements that an individual must meet in order to participate. For example, these requirements preclude diversions for situations in which:

the amount of drugs involved exceeds 7 grams (except that where an individual has been arrested for delivery of or possession with intent to deliver marijuana . . . [or] prescription controlled

¹²⁰ LAW ENFORCEMENT ASSISTED DIVERSION (LEAD), <http://leadkingcounty.org/about> (last visited Nov. 13, 2016).

¹²¹ The ability to refer an individual to LEAD gives officers “more options when patrolling streets and cracking down on drug crime. When an officer catches someone involved in drug-related criminal activity, they can arrest the suspect . . . or allow them to participate in [LEAD] and forego jail.” Mary Velan, *What Makes Seattle’s LEAD Program So Effective?*, EFFICIENTGOV (Jan. 13, 2016), <http://efficientgov.com/blog/2016/01/13/what-makes-seattles-lead-program-so-effective/>.

¹²² See Law Enforcement Assisted Diversion, *supra* note 120.

¹²³ LAW ENFORCEMENT ASSISTED DIVERSION (LEAD) REFERRAL AND DIVERSION PROTOCOL JUNE 2015, <http://static1.1.sqspcdn.com/static/f/1185392/26595193/1444410613677/June-2015-Seattle-LEAD-Referral-and-Diversion+Protocol.pdf?token=n4yyy7EvR3D5kR%2F0CLTmkZUD3UY%3D> (last visited Nov. 13, 2016).

¹²⁴ *Id.* at 2.

¹²⁵ Center for Health and Justice at TASC, *supra* note 94, at 14.

substances (pills), officers will consider the other criteria . . . without reference to the amount limitation); the individual does not appear amenable to diversion; . . . the individual appears to exploit minors or others in a drug dealing enterprise; . . . [the individual has] any conviction for Murder 1 or 2, Arson 1, Robbery 1, Assault 1, Kidnapping, VUFA 1, or any sex offense (or attempt of any crime listed here) . . . Robbery 2, Assault 2 or 3, Burglary 1 [unless more than 10 years has elapsed] . . . Assault 4, Violation of Domestic Violence No Contact [or] Protection Order, Burglary 2, or VUFA 2 [unless more than 5 years have elapsed].¹²⁶

Another aspect of the King County policy that makes the LEAD program ideal for protecting noncitizens is its “don’t ask” ordinance, enacted in 2009 to ensure that “all . . . [county] residents have access to necessary services and benefits” and to “uphold the county’s commitment to fair and equal access for all residents.”¹²⁷ The ordinance specifies that county departments, agencies, and employees “shall not condition the provision of county services on the citizenship or immigration status of any individual.”¹²⁸ Furthermore, it prohibits employees of the sheriff’s office from using “stops for minor offenses or requests for voluntary information as a pretext for discovering a person’s immigration status” or from “initiat[ing] any inquiry or enforcement action based solely on a person’s civil immigration status, race, inability to speak English, or inability to understand the deputy.”¹²⁹ This “don’t ask” policy has also been adopted by cities such as Seattle¹³⁰

¹²⁶ Center for Health and Justice at TASC, *supra* note 94, at 4.

¹²⁷ King County, Wash., Ordinance 16692 (Nov. 9, 2009).

¹²⁸ *Id.* at § 2(A).

¹²⁹ *Id.* at § 2(B)(2).

¹³⁰ Joe Connelly, *Murray: Seattle’s Policy on Immigrants – We Don’t Ask and We Won’t Tell*, SEATTLE PI (June 23, 2016, 2:20 PM), <http://www.seattlepi.com/local/politics/article/Murray-City-policy-on-immigrants-we-don-t-ask-8321484.php>.

and Bellevue,¹³¹ and ensures that noncitizens will not be deemed ineligible for programs such as LEAD based solely on their immigration status.

An expansion of King County’s LEAD program or similar pre-file diversion programs, including a “don’t ask” policy, into other counties could be ideal for communities who wish to protect noncitizen first-time offenders from deportation for minor crimes. Furthermore, trial courts should implement pre-file diversion programs not only for their general benefits,¹³² but also because they can provide important protection for some of the jurisdiction’s most vulnerable members—noncitizens.

First, pre-file programs divert individuals before they are booked into jail, which prevents noncitizens’ encounters with the criminal justice system from triggering ICE’s scrutiny. In 2017, the Trump administration revived Secure Communities, which pushes local jails to agree to allow “ICE access to information on individuals held in jails.”¹³³ In places like King County, Washington, where jails do little to cooperate with ICE, noncitizens are mostly insulated from potential deportation as a result of the booking process.¹³⁴ However, in places like Pierce County, Washington, jails record

¹³¹ Lynn Thompson, *Bellevue Police Won’t Ask Residents for Immigration Status*, Chief Says, SEATTLE TIMES (Nov. 19, 2016), <http://www.seattletimes.com/seattle-news/eastside/bellevue-police-wont-ask-residents-for-immigration-status-says-chief/>.

¹³² See *supra* text accompanying notes 107-09.

¹³³ Memorandum from John Kelly, Sec’y, U.S. Dept. of Homeland Sec., to Kevin McAleenan, Acting Comm’r, U.S. Customs and Border Protection, et al., 3 (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf; see also Michele Waslin, *The Secure Communities Program: Unanswered Questions and Continuing Concerns*, AM. IMMIGRATION COUNSEL 3 (Nov. 2011), https://www.americanimmigrationcouncil.org/sites/default/files/research/Secure_Communities_112911_updated.pdf.

¹³⁴ See *King County’s Practices Regarding Engagement in ICE-CBP Immigration Enforcement Actions*, WASHINGTON DEFENDER ASSOCIATION (Sept. 2, 2015), <http://www.defensenet.org/immigration-project/immigration-resources/specific-information-on-ice-enforcement-in-washington-county-jails/king/King%20Info%20Chart%209.2.15.pdf/view> (stating that King County provides ICE and CBP information that “does not include anything about demographics” and does not honor I-247s “either as a request to hold or a request for notification” and the jail does nothing to “notify ICE/CBP when a noncitizen is released from custody”).

and make available to ICE information about arrestees' places of birth and likely immigration status, and even ensure that "ICE is provided a daily list of noncitizens."¹³⁵ In counties that actively participate with ICE, pre-file diversion programs are particularly vital to noncitizens.

Second, pre-file diversion programs do not require participants to stipulate to the charges against them to qualify for diversion. As mentioned above, when a noncitizen makes any formal admission of guilt they fall under the INA's definition of "conviction."¹³⁶ Even without a plea agreement or finding of guilt by a court, the noncitizen is deportable.¹³⁷ Therefore, any diversion program aiming to protect noncitizen community members must take the INA's definition of "conviction" into account in its requirements.

In order to make a pre-file diversion program viable for noncitizens in counties that have not adopted a "don't ask" policy, training for officers and service providers should include information about the potential immigration consequences of criminal arrests and convictions. In addition, pre-file diversion should be routinely considered as an alternative for individuals who express concerns about their immigration status or otherwise indicate they may be noncitizens. Finally, programs should provide immigration-related services for participants.

Additionally, pre-file programs should include information in their officer training programs regarding the value of noncitizens to the community, as well as a detailed explanation of the immigration consequences of noncitizen interaction with the criminal justice system. The LEAD program, for example, is designed so that the "primary decision

¹³⁵ *Pierce County's Practices Regarding Engagement in ICE-CBP Immigration Enforcement Actions*, WASHINGTON DEFENDER ASSOCIATION (Sept. 2, 2015), <http://www.defensenet.org/immigration-project/immigration-resources/specific-information-on-ice-enforcement-in-washington-county-jails/pierce/Pierce%20Info%20Chart%209.2.15.pdf/view>.

¹³⁶ See *supra* notes 34-36 and accompanying text.

¹³⁷ See *id.*

maker [is] the LEAD-trained law enforcement officers on the street and their sergeants.”¹³⁸ Officer training under LEAD’s model includes detailed instruction on “social service challenges facing people who are homeless and/or struggling with addiction.”¹³⁹ The purpose of such instruction is to “debunk myths” related to homelessness and addiction, such as the idea that “getting housed and getting treatment is just a matter of willpower.”¹⁴⁰ This training also provides a fuller understanding of the “criminal history-based exclusions from housing and other benefits [which] are rarely understood by officers.”¹⁴¹ In order to serve all community members, including noncitizens, this training should be greatly expanded when pre-file programs such as LEAD are implemented in jurisdictions without a “don’t ask” policy. The additional training should incorporate the unique challenges faced by noncitizens, including language and cultural barriers, as well as the fear of law enforcement that has escalated in the Trump era.¹⁴²

Next, current pre-file diversion programs, as well as those implemented in new jurisdictions, should be routinely considered as an alternative to arrest for individuals who an officer suspects are noncitizens. Protocol in programs such as LEAD allows officers complete discretion in recommending individuals, though the program does have eligibility requirements.¹⁴³ If the training recommended above is effective, officers will be equipped to exercise this discretion in a way that benefits noncitizens. In addition, immigrant advocacy groups from the community

¹³⁸ Law Enforcement Assisted Diversion, *supra* note 123.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Yihyun Jeong, *Will Millions of Undocumented Migrants Still Trust Police?*, USA TODAY (Mar. 12, 2017), <https://www.usatoday.com/story/news/nation-now/2017/03/10/police-immigrants-crime-reporting/98974088/>.

¹⁴³ See Law Enforcement Assisted Diversion, *supra* note 139.

can actively engage in the program to encourage officers to utilize pre-file diversion for noncitizens.¹⁴⁴

Finally, immigration-related services, such as information about accessing legal help, should be provided in addition to housing, addiction treatment, and other social services.¹⁴⁵ There are currently several organizations throughout Washington that provide services for noncitizens facing the criminal justice system.¹⁴⁶ These organizations should be brought into the diversion program to provide legal advice for noncitizens. It is not only the police officers who can benefit from a detailed description of the immigration consequences of criminal acts for noncitizens: noncitizens themselves, once fully informed of the realities of their legal situations, will be able to make well-reasoned and likely law-abiding choices in the future. Therefore, the pre-file diversion program will act as a safety net for noncitizens who commit minor crimes as well as a deterrent for future criminal activity.

2. Diversion at the Pretrial or Prosecution Phase

Jurisdictions that do not have pre-file programs such as LEAD can still utilize existing pretrial diversion programs, such as drug courts, to benefit noncitizens. However, for drug courts to be a viable solution for protecting noncitizens from deportation, they should not require participants to have

¹⁴⁴ See *Direct Legal Services*, NORTHWEST IMMIGRANT RIGHTS PROJECT, <https://www.nwirp.org/our-work/direct-legal-services/> (last viewed June 26, 2017); *Washington Defender Association Immigration Project*, WASHINGTON DEFENDER ASSOCIATION, <http://www.defensenet.org/immigration-project> (last visited June 26, 2017).

¹⁴⁵ Under *Padilla v. Kentucky*, 559 U.S. 356 (2010), defense counsel is already required to advise defendants of potential immigration consequences of plea deals, convictions and other outcomes. In addition to this legal advice by defenders, diversion programs should connect noncitizens to nonprofit organizations that provide immigration issue-specific counsel, thus expanding the range of legal services available to a noncitizen entering diversion programs.

¹⁴⁶ These include the Northwest Immigrant Rights Project, Refugee and Immigration Services of Catholic Community Services, OneAmerica, and others.

any particular immigration status, or make admissions of guilt or pleas. As discussed above, jurisdictions like King County that have implemented a “don’t ask” policy regarding immigration status do not consider an individual’s citizenship or lack thereof when assessing eligibility for drug courts.¹⁴⁷ However, other jurisdictions, such as Pierce County, require participants to be U.S. citizens or lawful permanent residents (LPR).¹⁴⁸ This leaves two groups of noncitizens vulnerable to deportation as a result of even minor drug offenses: undocumented individuals and those who have a valid visa but are not LPRs. In order to provide full protection for noncitizens, who are vital members of Washington communities, this requirement based on immigration status should be removed from diversion programs.

Still other jurisdictions, such as Clark County, mandate that a “defendant must plead to *all* charged crimes.”¹⁴⁹ As discussed above, a “conviction” under the INA includes admissions of guilt and pleas.¹⁵⁰ Thus pretrial diversion programs that require a defendant to plead to charges is not necessarily an immigration-safe option for noncitizens. The Ninth Circuit has created jurisdiction-specific law holding that “adjudication under [pretrial diversion programs] does not result in a conviction for immigration purposes, [but the] adjudication must be complete . . . not just potentially available.”¹⁵¹ However, this holding could be overturned, or Attorney General Jeff Sessions, who is known for his tough-on-immigration policies,

¹⁴⁷ See *supra* notes 22–23 and accompanying text; see also King County Drug Diversion Court, *supra* note 93, at 3 (outlining screening, referral and eligibility policies without any reference to citizenship).

¹⁴⁸ *Drug Court Eligibility Criteria*, PIERCE COUNTY 3 (Apr. 28, 2016), <http://www.co.pierce.wa.us/DocumentCenter/View/40536>.

¹⁴⁹ *Drug Court Defense Packet Materials*, CLARK COUNTY 2, (Mar. 2016), https://www.clark.wa.gov/sites/default/files/drug_court_opt_in_instructions_march_2016.pdf.

¹⁵⁰ 8 U.S.C. § 1101(a)(48)

¹⁵¹ MARY E. KRAMER, IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY 442 (2009) (citing *Chavez-Perez v. Ashcroft*, 386 F.3d 1284 (9th Cir. 2004)).

could work to undermine to such leniency.¹⁵² As a result, jurisdictions that require defendants to plead to charges should implement more immigration-safe agreements in their diversion courts, as King County has done already.

C. Funding Issues

One potential concern about expanding pretrial diversion programs to benefit noncitizens is the cost. Immigration opponents argue that noncitizens, particularly undocumented individuals, “drain the system”¹⁵³ by relying heavily on public benefits, thereby “creating a serious and unfair burden for citizens.”¹⁵⁴ Therefore, Washington should not spend money to expand programs to benefit these individuals. However, a recent study found that “[t]he benefits cost of non-citizens is 42 percent below the cost of native-born adults . . . [and overall] non-citizen immigrants receive fewer government benefits than similarly poor natives.”¹⁵⁵ One reason for this could be that undocumented noncitizens are ineligible for many benefits, such as social security, despite paying into the system like everyone else.¹⁵⁶ In fact, they “contribute more in payroll taxes than they will ever consume in public benefits.”¹⁵⁷

¹⁵² Rob Garver, *As AG, Sessions Could Radically Influence Immigration Enforcement*, THE FISCAL TIMES (Nov. 18, 2016), <http://www.thefiscaltimes.com/2016/11/18/AG-Sessions-Could-Radically-Influence-Immigration-Enforcement> (stating that “the attorney general . . . exercises control over the Executive Office for Immigration Review, a panel of administrative judges who adjudicate immigration court proceedings, appellate reviews, and administrative hearings”).

¹⁵³ Maria Santana, *5 Immigration Myths Debunked*, CNN MONEY (Nov. 20, 2014, 7:12 PM), <http://money.cnn.com/2014/11/20/news/economy/immigration-myths>.

¹⁵⁴ Leighton Ku & Brian Bruen, *Poor Immigrants Use Public Benefits at a Lower Rate than Poor Native-Born Citizens*, CATO INSTITUTE (Mar. 4, 2013), <https://www.cato.org/publications/economic-development-bulletin/poor-immigrants-use-public-benefits-lower-rate-poor>.

¹⁵⁵ *Id.*

¹⁵⁶ Santana, *supra* note 153; *see also* American Immigration Council, *supra* note 76.

¹⁵⁷ Santana, *supra* note 153.

In addition to receiving fewer benefits, noncitizens, whether documented or not, pay state and local taxes.¹⁵⁸ For example, noncitizens in Washington paid over \$316 million in taxes in 2014.¹⁵⁹ Accordingly, the argument that noncitizens are a drain on Washington’s economy is unfounded. As a result, the state should not hesitate to implement a program so necessary to preventing these individuals from being taken from their families and communities and banished from the United States.

Further support for expanding diversion programs to benefit noncitizens is the potentially cost-saving nature of such programs. For example, the Drug Treatment Alternative-to-Prison program in Kings County, New York has saved the state an estimated \$68,192 per participant.¹⁶⁰ Another analysis of 593 drug courts across the country found that the net benefit¹⁶¹ of these programs was “considerable, totaling between \$5,680 and \$6,208” per individual and primarily benefitting taxpayers.¹⁶² Finally, in King County, Washington, participants in the LEAD program cost an average of \$4,763 per year after participating in the program, while typical criminal defendants who were considered in the study cost an average of \$11,695.¹⁶³

¹⁵⁸ See Lisa Christensen Gee et al., *Undocumented Immigrants’ State & Local Tax Contributions*, INSTITUTE ON TAXATION & ECONOMIC POLICY, 3 (Feb. 2016), <https://itep.org/wp-content/uploads/immigration2017.pdf>.

¹⁵⁹ *Id.*

¹⁶⁰ Center for Health and Justice at TASC, *supra* note 94, at 19.

¹⁶¹ Shelli B. Rossman et al., *Multi-Site Adult Drug Court Evaluation: The Impact of Drug Courts*, URBAN INSTITUTE 240–41 (Nov. 2011), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412357-The-Multi-site-Adult-Drug-Court-Evaluation-The-Impact-of-Drug-Courts.PDF> (defining “net benefit” as the average cost to society “during the year and a half following their initial arrest”).

¹⁶² *Id.*

¹⁶³ Susan E. Collins et al., *LEAD Program Evaluation: Criminal Justice and Legal System Utilization and Associated Costs*, HARM REDUCTION RESEARCH AND TREATMENT LAB: UNIVERSITY OF WASHINGTON—HARBORVIEW MEDICAL CENTER 20 (June 24, 2015), <http://static1.1.sqspcdn.com/static/f/1185392/26401889/1437170937787/June+2015+LEAD-Program-Evaluation-Criminal-Justice-and-Legal-System-Utilization-and-Associated-Costs.pdf?token=XdR9RKBlawZTCvDwQSScmwCw83o%3D>.

This means the system saved, on average, almost \$7,000 per LEAD participant per year.

D. Other Likely Counter-Arguments

Immigration is a highly controversial issue, and the controversy only seems to be increasing as Trump's presidency continues.¹⁶⁴ As a result, significant pushback against utilizing pre-file and pretrial diversion programs to benefit noncitizens is foreseeable. This section addresses three of the most likely arguments that could be made against counties wishing to implement such a change. First, opponents would likely argue that these changes encourage a disrespect for the law by encouraging local courts to implement policies that circumvent federal immigration laws. Second, many maintain that noncitizens are dangerous criminals and should be deported, rather than provided services that allow them to stay in our state. Third, opponents would argue that noncitizens take jobs that would otherwise go to citizens, thereby draining society of precious resources. Each of these arguments can be countered with facts showing that opponents' reasoning has been founded on fear and myths that we as a society should reject.

1. Utilizing Pre-File and Pretrial Diversion Programs to Benefit Noncitizens Does Not Disrespect Federal Law

One likely argument against using diversion programs to protect noncitizen community members is that it facilitates a disrespect for the law by circumventing immigration laws that require deportation for criminals. However, discretion has long been a staple of criminal law,¹⁶⁵ and it allows

¹⁶⁴ See, e.g., Scott Calvert et al., *Donald Trump, 'Sanctuary City' Mayors Set to Clash over Immigration Policies*, WALL STREET J. (Jan. 25, 2017), <https://www.wsj.com/articles/sanctuary-cities-brace-for-proposed-funding-cuts-1485373756>.

¹⁶⁵ See *Inmates of Attica v. Rockefeller*, 477 F.2d 375, 379 (2d Cir. 1973); *U.S. v. Batchelder*, 442 U.S. 114 (1979).

for a wide variety of outcomes for individuals who commit criminal acts. Although Congress has largely eliminated judicial discretion in immigration matters, other forms of discretion in the process are permitted.¹⁶⁶ For example, county jails are not yet *required* by law to participate in ICE's Secure Communities Program.¹⁶⁷ Therefore, jurisdictions such as King County who choose not to notify ICE of individuals' immigration status are simply exercising their discretion, not violating law.

Another example of the use of discretion is that typically, when negotiating a plea deal, a defendant can end up pleading to a crime that has little to nothing to do with their actual conduct.¹⁶⁸ The plea provides an acceptable outcome for the prosecutor and defendant alike, so little thought is given to the means used to reach that end.¹⁶⁹ In the same way, discretion at the criminal court level regarding the desired ends in a defendant's situation plays an important role in the use of diversion to offer protection to noncitizens.¹⁷⁰ Police officers and prosecutors who offer diversion to a noncitizen are looking more to their desired result: rehabilitation and restitution, not deportation. This is consistent with the use of discretion allowed by both positions, and reflects a concern for individual outcomes that exceeds the desire for adherence to formalities and use of full prosecutorial force against every individual in every case.

¹⁶⁶ See discussion *supra* Section I(C).

¹⁶⁷ Exec. Order No. 13,768, *supra* note 22.

¹⁶⁸ Paul Bergman, *How Plea Bargains Get Made*, NOLO, <http://www.nolo.com/legal-encyclopedia/how-plea-bargains-get-made.html> (last visited Feb. 20, 2017) (stating that "a prosecutor may agree to change or even drop some charges in exchange for the defendant's plea").

¹⁶⁹ Sara J. Berman, *The Basics of a Plea Bargain*, NOLO, <http://www.nolo.com/legal-encyclopedia/the-basics-plea-bargain.html> (last visited Feb. 20, 2017) (stating that plea bargains are popular because "[a]s criminal courts become ever more crowded, prosecutors and judges alike feel increased pressure to move cases quickly through the system . . . [and] a plea bargain provides both prosecution and defense with some control over the result").

¹⁷⁰ For example, in the Seattle LEAD program, both the LEAD-trained arresting officer and the Prosecutor have authority to refer individuals for diversion; see Law Enforcement Assisted Diversion, *supra* note 123.

2. Noncitizens are Not Dangerous Criminals Who Should be Deported

A further potential argument against using diversion programs for the benefit of noncitizens is that they are dangerous criminals and should not be allowed to stay in our communities.¹⁷¹ However, the direct relationship between immigration status and criminal activity has been declared a myth.¹⁷² One study explains:

because many immigrants to the United States, especially Mexicans and Central Americans, are young men who arrive with very low levels of formal education, popular stereotypes tend to associate them with higher rates of crime and incarceration. The fact that many of these immigrants enter the country through unauthorized channels or overstay their visas often is framed as an assault against the “rule of law,” thereby reinforcing the impression that immigration and criminality are linked. This association has flourished in a post-9/11 climate of fear and ignorance where terrorism and undocumented immigration are often mentioned in the same breath.

But anecdotal impression cannot substitute for scientific evidence. In fact . . . the problem of crime in the United States is not “caused” or even aggravated by immigrants, regardless of their legal status.¹⁷³

Statistics used to support this argument include the fact that the undocumented noncitizen population “has doubled to 12 million since 1994, [yet the] violent crime rate in the United States has declined 34.2 percent and the property crime rate has fallen 26.4 percent.”¹⁷⁴ Even cities with the highest noncitizen populations have seen a drop in crime since 1994.¹⁷⁵

¹⁷¹ See Rubén G. Rumbaut, et al., *The Myth of Immigrant Criminality and the Paradox of Assimilation*, AMERICAN IMMIGRATION COUNCIL, 3 (2007), <https://www.americanimmigrationcouncil.org/sites/default/files/research/Imm%20Criminality%20%28IPC%29.pdf>.

¹⁷² *Id.* at 1.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

There is simply no explanation for the decrease in violent crime if all or even the majority of noncitizens are “dangerous criminals” as some claim.

Instead, it is much more likely that noncitizens are law-abiding.¹⁷⁶ For example, young men who were not born in the U.S. and who failed to complete high school are much less likely to be imprisoned than U.S.-born dropouts.¹⁷⁷ Furthermore, in 2000 the rate of incarceration for native-born males ages 18 to 39 “was 5 times *higher* than the incarceration rate of foreign-born men . . . [and] the lower incarceration rate among immigrants was found in every pan-ethnic category without exception.”¹⁷⁸ This data is confirmed by several other studies,¹⁷⁹ though it is often ignored by those who claim that noncitizens are criminals and dangers to society.

3. Noncitizens are Not Drains on Society

Another argument against providing protections for noncitizens is that noncitizens take jobs that would otherwise go to citizens, thereby further “draining society.”¹⁸⁰ However, studies show that “young immigrant workers help balance the decline in young native born workers, filling crucial jobs in construction, healthcare, hospitality, agriculture, and even research and engineering.”¹⁸¹ One recent report “[assembling] research from 14 leading economists, demographers, and other scholars” from both sides of the aisle states that immigration has “little to no negative effects on overall wages and employment of native-born workers in the longer term.”¹⁸² In addition, “high-skilled immigrants, especially in technology and

¹⁷⁶ *Id.* at 2.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 6.

¹⁷⁹ *Id.* at 12.

¹⁸⁰ See Sec. III and IV (B)(2)(c), *supra* pp. 15, 30-32 (discussing other “drains on society” arguments).

¹⁸¹ See Jayapal, *supra* note 78, at 19.

¹⁸² Julia Preston, *Immigrants Aren't Taking Americans' Jobs, New Study Finds*, N.Y. TIMES (Sept. 21, 2016), http://www.nytimes.com/2016/09/22/us/immigrants-arent-taking-americans-jobs-new-study-finds.html?_r=0.

science . . . had a significant ‘positive impact’ on Americans with skills, and also on working-class Americans. They spurred innovation, helping create jobs.”¹⁸³ Finally, noncitizens contribute to the workforce by “add[ing] necessary skills in a globally interconnected market; they contribute cultural knowledge . . . and provide language skills” necessary to be competitive in the international business arena.¹⁸⁴ Because noncitizens are such important members of local economies, communities should do more to protect them rather than deport them.

V. CONCLUSION

The United States’ immigration system is broken. It provides immense power to the executive, few rights to the individuals it most affects, and results in harsh consequences for minor criminal offenses. When a citizen and a noncitizen commit the same minor crime, and one is sentenced to parole while the other is detained and deported from family and livelihood, serious questions must be asked, particularly by the communities from which these noncitizens are taken. Jurisdictions that recognize how vital noncitizens are to local and national economies and communities can take steps to offer protections from detention and deportation—protections that are already offered to many citizens to great effect. Pre-file and pretrial diversion programs are the future of the criminal justice system, and should be utilized now in ways that provide protection for noncitizens who are first-time minor drug offenders. Everyone makes mistakes. Let communities come together and declare that diversion, not deportation, is the most just outcome for all involved.

¹⁸³ *Id.*

¹⁸⁴ *See Jayapal, supra* note 78, at 22.